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IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1967

No. 717

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered in the above-styled cause on April 4, 1967.

Petition for a Writ of Certiorari to the District Court of Appeal, Third District, was timely sought in the Supreme Court of Florida, which by its order of July 13,

1967, dismissed the cause for lack of jurisdiction. The jurisdictional ground relied upon in the Petition for Writ of Certiorari was conflict of decision between the instant decision and a prior decision of the Florida Supreme Court: City of Miami v. Kayfetz, 92 So.2d 798, (Fla. 1957) pursuant to Florida Appellate Rule 4.5c (6) and Article V, Section 4, of the Florida Constitution.

The record in the District Court of Appeal, Third District, is no longer available from that Court, it having been sent back to the lower court. Since the record in the Supreme Court of Florida contained the essential items (all of which were part of the record before the District Court of Appeal of Florida, Third District), a certified copy of the record in the Supreme Court of Florida has been provided.

CITATION TO OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, was reported in 197 So.2d 50. (Appendix A.) The opinion of the Supreme Court of Florida is reported in ____So.2d____. (Appendix B.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3) in that a right is claimed under the First and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

Is a city ordinance which prohibits a liquor licensee

from knowingly employing a homosexual person, or from knowingly selling to, serving or allowing a homosexual person to consume alcoholic beverages, or to allow two or more homosexual persons to congregate or remain in his place of business, violative of the rights of the petitioner, an admitted homosexual, to freedom of association, due process and equal protection of the laws, under the First and Fourteenth Amendments to the United States Constitution, respectively?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States and Florida Constitutions and relevant Statutes are set forth in Appendix C as follows:

Florida Statutes 800.01 and 800.02
Article V, Section 4, Florida Constitution
28 USC Sec. 1257 (3)
United States Constitution, Amendment I
United States Constitution, Amendment XIV, Sec. 1
Section 4-13, City Code of Miami

STATEMENT OF THE CASE

The Petitioner filed a petition for declaratory decree and injunction in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The petition, with permission of the Circuit Court, was amended to add as party defendant the State Attorney for the said judicial circuit in addition to the already named City of Miami. The relief sought by Petitioner, who alleged in

his petition that he is a homosexual person (R-1-Amended Petition), was a declaratory decree as to the validity and constitutionality of a City of Miami ordinance (R-3-Amended Petition and Appendix C), Section 4-13 of the City Code, and for an injunction prohibiting the City and the State Attorney from enforcing and imposing the provisions of said Section against the Petitioner. The said ordinance makes it a crime for the owner of an establishment serving intoxicating liquor to employ homosexuals, to knowingly serve alcoholic beverages to homosexuals or to allow two or more homosexuals to congregate or remain in his place of business.

The Petition alleged that the Petitioner is a homosexual person and that the ordinance is "arbitrary as to those persons against whom it is to be applied, it does not give any valid definition of those against whom it is to be applied, it is in violation of the First Amendment to the Constitution of the United States in that it violates the rights of assembly" and the petition further alleged violation of the Fourteenth Amendment by denying Petitioner and others similarly situated the right to due process and equal protection of the laws. The Petitioner also alleged that by virtue of the said ordinance he is wrongfully and unlawfully barred from enjoying the rights and privileges guaranteed him as a citizen of the United States of America.

After the respondents answered and on motion of the respondents for summary final decree, the Circuit Judge entered a final decree declaring the ordinance to be constitutional and denying the Petition for an injunction. Appeal was prosecuted to the District Court of Ap-

peal of Florida, Third District, which affirmed the decree (Appendix A). Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Third District, was timely filed in the Florida Supreme Court, pursuant to Article V, Section 4 of the Florida Constitution. Said Petition was dismissed for lack of jurisdiction. (Appendix B.)

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The instant case raises important questions of First Amendment right to assembly and Fourteenth Amendment due process and equal protection of the laws, with reference to homosexual persons. The decision of the District Court of Appeal of Florida, Third District, is predicated upon two Florida Statutes, Sections 800.01 and 800.02, (Appendix C), making certain conduct a crime: the first-mentioned prohibiting the crime against nature and the second-mentioned prohibiting unnatural and lascivious acts. Because specific acts are made criminal in the State of Florida, reasons the Court, the State, by virtue of its police power, may inhibit the gathering of homosexuals where liquor is sold and prohibit the sale or service to them for on-premises consumption because the criminal acts, prohibited by Florida Statutes, Sec. 800.01 and 800.02, when practiced, are of a homosexual nature. In effect, what the State is doing is penalizing a status or condition when no criminal act is being committed. In **Robinson v. California,** 370 U.S. 660, 82 S.Ct. 1417 (1962), the concurring opinion of Mr. Justice Harlan pointed out that drug addiction is nothing more than a compelling propensity to use narcotics, but that this mere

desire to use narcotics (and thereby to commit a criminal act by the use) could not be the subject for criminal punishment. Distinction was made between a status or condition as opposed to the actual use of narcotics. Similarly, homosexuality is a status or condition; it is two forms of sexual conduct, of a homosexual nature, which are prohibited by Florida Statutes 800.01 and 800.02. The status of homosexuality is not made criminal by any statute of the State of Florida, nor could the state enact such statute. **Robinson v. California, supra.** Yet the status is penalized by the subject ordinance in that persons of this status, who are not committing any criminal acts, and which status is not criminal, are prohibited from exercising rights and privileges enjoyed by other persons.

The status of homosexuality has been recognized as inadequate to sustain an allegation of immoral conduct brought by the United States Civil Service Commission, which disqualified a homosexual applicant for public employment. The disqualification on the ground of the applicant's homosexuality, without more, was held invalid. **Scott v. Macy,** 349 F.2d 182 (D.C. Cir. 1965). Entitled to public employment by the United States Government, a homosexual, nevertheless, is prohibited, by virtue of his status, from entering a lounge in Miami, alone or with a fellow employee after work, and buying a drink.

That the term "homosexual" has no clearly defined meaning is recognized in **Scott v. Macy, supra,** which recognizes the view that the term may be applied to activities, *attitudes,* feelings, *thoughts,* or repression of any of these. By disallowing a homosexual to drink or be served an alcoholic beverage in a licensed lounge or bar, the State

is circumscribing or denying his liberty without due process of law and is denying to him rights enjoyed by others, resulting in a denial of equal protection of the laws.

The test set forth by this Court in determining whether a State has denied its citizens equal protection is predicated on the rational basis on which the State bases its action. **Jacobsen v. Massachusetts,** 197 U.S. 11. If there has been an arbitrary or irrational classification by the State, such action has been held to be violative of the equal protection clause of the Fourteenth Amendment. **Skinner v. Oklahoma,** 316 U.S. 535 (1942). That homosexuals have risen high in public service — both in Congress and in the Executive branch and have served with distinction—is recognized in Mr. Justice Douglas' dissent, joined in by Mr. Justice Fortas, in **Boutilier v. Immigration and Naturalization Service,** ____U.S.____, 18 L.Ed.2d 661 (1967). Judge Moore's dissent in **Boutilier v. Immigration and Naturalization Service,** 363 F.2d 488 (2nd Cir. 1966), cites as homosexuals some great contributors to western culture, namely Sappho, Leonardo da Vinci, Michelangelo, André Gide, and perhaps even Shakespeare. In light of these pronouncements, it is difficult to eke out a rational basis for the classification created by the State (through its delegee, the City of Miami) in the subject ordinance. Furthermore, it has been held that the liquor business is like any other business in that the State is limited in its regulation of it by due process and equal protection requirements. **Hornsby v. Allen,** 330 F.2d 55 (5th Cir. 1964).

The problem of homosexuality is not an isolated one and because many people are affected, it is a valid sub-

ject for judicial inquiry by this Court. It has been recognized (in the dissent of Mr. Justice Douglas, joined in by Mr. Justice Fortas, to **Boutilier v. Immigration and Naturalization Service, supra,** citing Kinsey, **Sexual Behavior in the Human Male**) that homosexual activity in the human male is much more frequent than is ordinarily realized and that in the age group of single males between 36 and 40 the incidence of homosexual experience is 38.7% (thirty-eight and seven-tenths per cent).

In **Vallerga v. Dept. of Alcoholic Beverage Control,** 1 Cal. Rptr. 494, 347 P.2d 909 (Cal. 1960), a statute provided that a basis for liquor license suspension or revocation is the use of the premises as a resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers or sexual perverts. It was held that the allegation and admission that the premises were established as a resort for lesbians and homosexuals was not sufficient to justify revocation or suspension upon mere proof of resorting to or patronage of licensed premises without proof of illegal, immoral or indecent action on such premises. In **Stoumen v. Reilly,** 37 Cal. 2d 713, 234 P.2d 969 (1951), where there was no evidence of misconduct by homosexuals meeting in and patronizing the licensee's premises, it was stated:

> "Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts."

As to the right of assembly or association, it has been held that the Fourteenth Amendment to the United

States Constitution makes the First Amendment applicable to the States. **Murdock v. Pennsylvania,** 319 U.S. 105, 63 S.Ct. 830 (1943). As demonstrated hereinabove, no rational basis for the classification can be found; therefore, the right to assemble should not be infringed and should be guaranteed to Petitioner. No matter how unpopular the views of the minority group assembling, the right to associate is guaranteed under the First Amendment. The concurring opinion of Mr. Justice Black in **Gibson v. Florida Legislative Investigating Committee,** 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889 (1963), is illustrative of this principle. The fact that the subject ordinance penalizes the liquor licensee and not the homosexual does not redeem it, for what a state may not do directly, it may not accomplish indirectly. As long as Petitioner does not indulge in conduct violative of the laws of Florida, he has a constitutional right to enter a bar and associate with whom he pleases whether his associates be heterosexual, homosexual or asexual. Homosexuality, in and of itself, is not a crime, while the practice of homosexual acts is a crime. Petitioner, so long as he does not practice such acts or persuade others to do so, commits no crime which prohibits him from contact with other persons, whether they be homosexual or heterosexual.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALFRED I. HOPKINS

JUDITH A. BRECHNER
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District, was served this _____ day of October, 1967, by depositing a copy of the same in the United States mail with sufficient postage pre-paid to RICHARD E. GERSTEIN, State Attorney, Metropolitan Justice Building, Miami, Florida, and JACK RICE, Esq., City Attorney, City of Miami, 65 SW First Street, Miami, Florida.

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A. D. 1967

CASE NO. 66-551

RICHARD A. INMAN,

Appellant,

vs.

CITY OF MIAMI, a municipal corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit, In and for Dade County, Florida,

Appellees.

Opinion filed April 4, 1967.

An Appeal from the Circuit Court for Dade County, Grady L. Crawford, Judge.

Maurice Rosen; Tobias Simon, for appellant.

Richard E. Gerstein, State Attorney; Jack R. Rice,

Jr., City Attorney and S. R. Sterbenz, Assistant City Attorney, for appellees.

Before PEARSON, CARROLL and BARKDULL, JJ.

PEARSON, Judge.

This appeal is from a final decree in a declaratory action. The trial court held an ordinance of the City of Miami constitutional as against the attacks of the appellant. Appellant's complaint alleged that he is a homosexual, and that by the ordinance he is denied the right to "visit and enjoy himself or with his friends who are similarly situated the public places of amusement within the City of Miami." The ordinance prohibits liquor licensees from knowingly employing a homosexual person, or knowingly sell to, serve, or allow a homosexual person to consume alcoholic beverages, or to knowingly allow two or more homosexual persons to congregate or remain in his place of business. Appellant did not attack a particular section or provision of the ordinance but confines himself to a prayer: ". . . that this court take jurisdiction of this matter and find section 4-13 of the Code of the City of Miami to be unconstitutional and that it issue its order enjoining the respondents from enforcing the provisions of said ordinance."

The final decree appealed holds that this section of the code of the City of Miami "has a rational relation to public health, morals, safety and general welfare." We agree.

It may be that the ordinance is inartfully drawn and that enforcement of one or more provisions may prove

difficult or even impossible. Nevertheless, the question here presented is whether it is void as a whole. When a court construes the validity of an ordinance, it must construe it to be legal if it is possible to do so. It must also strive to construe it as to give reasonable effect to its provisions. City of Miami v. Kayfetz, Fla.1957, 92 So.2d 798. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State v. City of Miami, 101 Fla. 585, 134 So. 541. (1931).

The business of the distribution of liquor is one which is particularly burdened with a public concern and which may be limited and regulated by the State as a privilege. It follows that the legislative authority may limit its distribution to conditions under which liquor will be distributed with the least possible harm to the public. City of Miami v. Kayfetz, Fla.1957, 92 So.2d 798; City of Miami v. Jiminez, Fla.App.1961, 130 So.2d 109. The object of the ordinance as a whole is to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal by the Legislature of the State of Florida. See Sections 800.01, 800.02 Fla.Stat.

It therefore follows that appellant's generalized attack upon the ordinance as a whole was properly denied.

The City by cross assignment contends that the court should have granted its motion to strike the complaint under Rule 1.14 Florida Rules of Civil Procedure, 1965 Revision, because there was unrefuted evidence showing that appellant was not a homosexual at the time the pro-

ceeding was instituted. In view of our conclusion upon the appeal, it is unnecessary to consider the exercise of the trial court's discretion in this particular.

The decree is affirmed.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1967

THURSDAY, JULY 13, 1967

CASE NO. 36,433

DISTRICT COURT OF APPEAL,

THIRD DISTRICT

RICHARD A. INMAN,

Petitioner,

vs.

CITY OF MIAMI, ETC., ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy
TEST:
SID J. WHITE
Clerk Supreme Court.
CC: Hon. W. P. Carter
Hon. E. B. Leatherman
Hon. Judith A. Brechner
Messrs. Maurice Rosen and Tobias Simon
Hon. Jack R. Rice, Jr.; Attn. S. R. Sterbenz
Hon. Richard E. Gerstein

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Florida Statute, Section 800.01

Crime against nature; punishment. Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years.

Florida Statute, Section 800.02

Unnatural and lascivious act. Whoever commits any unnatural and lascivious act with another person shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.

Article V, Section 4, Florida Constitution

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may

issue writs of certiorari to commissions established by law.

28 USC 1257 (3)
State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or Commission held or authority exercised under, the United States.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV, Sec. 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

Section 4-13, City Code of Miami

It shall be unlawful for an owner, manager, operator or employee of a business licensed to sell intoxicating beverages to knowingly employ in such business a homosexual person, lesbian or pervert as the same are commonly accepted and understood. It shall likewise be unlawful for an owner, operator, manager or employee of a business licensed to sell intoxicating beverages to knowingly sell to, serve to or allow consumption of alcoholic beverages by a homosexual person, lesbian, or pervert, as the same are commonly accepted and understood, or to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 711

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District.

PREFACE

The following abbreviations will be used throughout this brief:

RR. — Respondents' certified portions of the Record.

District Court — The District Court of Appeal, Third District, State of Florida.

Petitioner states in the first portion of his brief, at p. 2:

> "The record in the District Court of Appeal, Third District, is no longer available from that Court, it having been sent back to the lower court. Since the record in the Supreme Court of Florida contained the essential items (all of which were part of the record before the District Court of Appeal of Florida, Third District), a certified copy of the record in the Supreme Court of Florida has been provided."

Respondents do not know what Petitioner has had certified as a transcript of the record in this case, since said transcript admittedly is not "... a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed ...", as required by Rule 21.1, Supreme Court of The United States, Revised Rules, nor has Petitioner indicated, on his notification of filing the instant Petition for a Writ of Certiorari, "the contents of the record filed ... either itemized in detail ... or appropriately summarized ..." as required by Rule 21.2, supra.

QUESTION PRESENTED

The Petitioner's omission of the word "knowingly" at a most pertinent place in his statement of the "Question Presented" indicates the weakness of his case. By repeating the "Question Presented" as framed by the Petitioner, with the word "knowingly" placed in said question where it should have been placed by Petitioner, Respondents very respectfully submit that they have pro-

vided the key to the reason, and argument supporting the reason, why this Petition should be denied.

Petitioner's "Question Presented" (which appears at pp.2-3 of his Petition) with the word "knowingly" inserted by the Respondents where it has been omitted by the Petitioner, is as follows:

> "Is a city ordinance which prohibits a liquor licensee from knowingly employing a homosexual person, or from knowingly selling to, serving or allowing a homosexual person to consume alcoholic beverages, or to knowingly allow two or more homosexual persons to congregate or remain in his place of business, violative of the rights of the petitioner, an admitted homosexual, to freedom of association, due process and equal protection of the laws, under the First and Fourteenth Amendments to the United States Constitution, respectively?"

Petitioner, further, states in his "Question Presented" that he is "an admitted homosexual". As can be seen by the Respondents' certified portions of the record, although alleging that he is a homosexual in his petition for declaratory relief, Petitioner denied that he is a homosexual shortly thereafter in a voluntary appearance on a television program (RR. 3-4).

Thus, in truth, and based on the Petitioner's latest utterance on the subject, in place of the words "an admitted homosexual" in the above quoted "Question", the words "a person who denies being a homosexual" should appear.

STATEMENT OF THE CASE

The following corrections to the "Statement of the Case" as framed by the petitioner are necessary.

Respondents moved to strike those portions of petitioner's petition for declaratory relief in which petitioner alleged that he is a homosexual person on the ground that, after filing the petition for declaratory relief, petitioner stated publicly, on a television broadcast, that he was not a homosexual person (RR. 1-4).

Under the Florida rule governing such a motion to strike, summary judgment can be entered as a result of such a proceeding. Rule 1.14, Rules of Civil Procedure, 1965 Revision, 30 F.S.A., states:

> "RULE 1.14. SHAM PLEADINGS: EXCEPTIONS FOR IMPERTINENCE, ETC., ABOLISHED.
>
> (a) Motion to Strike. If a party deems any pleading or part thereof filed by the other party to be a sham, he may, before the cause is set for trial, move to strike said pleading or part thereof and the court shall hear said motion, taking evidence of the respective parties, and if the motion be sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment, decree, decree pro confesso, and summary decree, on the merits, may, in the discretion of the court, be entered, or the court may for good cause shown, permit additional pleadings to be filed.

(b) Same—Contents. The motion to strike shall be sworn to and shall set forth fully the facts on which the movant relies and may be supported by affidavit. No traverse of the motion shall be required.

(c) Exceptions for Impertinence, etc., Abolished. Exceptions to pleadings for scandal, impertinence or irrelevancy are abolished but the court may, upon motion to strike or upon its own initiative, strike out any redundant, impertinent, irrelevant or scandalous matter which is prejudicial to the excepting party upon such terms as the court shall think fit."

Respondents motion to strike was denied (RR. 5), but respondents assigned this denial as error in its cross-assignments of error in connection with petitioner's appeal to the District Court (RR. 7).

The District Court, in the decision sought to be reviewed in the instant proceeding, stated, relative to this assignment of error (Inman v. City of Miami, Fla. App. 1967, 197 So.2d 50, at p. 52):

"The City by cross assignment contends that the court should have granted its motion to strike the complaint under Rule 1.14 Florida Rules of Civil Procedure, 1965 Revision, 30 F.S.A., because there was unrefuted evidence showing that appellant was not a homosexual at the time the proceeding was instituted. In view of our conclusion upon the appeal, it is unneces-

sary to consider the exercise of the trial court's discretion in this particular."

Further, in Petitioner's "Statement of the Case", petitioner states:

> "...The said ordinance makes it a crime for the owner of an establishment serving intoxicating liquor to employ homosexuals, to knowingly serve alcoholic beverages to homosexuals or to allow two or more homosexuals to congregate or remain in his place of business."

It is necessary to correct the above quoted portion of petitioner's "Statement of the Case". In the first place, a violation of a municipal ordinance in Florida is an offense, not a crime, Boyd v. County of Dade, Fla. 1960, 123 So.2d 323.

Much more important, however, is petitioner's studied omissions of the term "knowingly" in two very important places in the above quoted statement. This quoted statement corrected to include the term "knowingly" with same underlined to clearly show the fact and place of these omissions is set out, as follows:

> "...The said ordinance makes it an offense for the owner of an establishment serving intoxicating liquor to knowingly employ homosexuals, to knowingly serve alcoholic beverages to homosexuals or to knowingly allow two or more homosexuals to congregate or remain in his place of business."

In further correction of petitioner's "Statement of the Case", respondents state that petitioner did not file a petition for rehearing addressed to the decision of the District Court now sought to be reviewed nor was a petition for rehearing filed addressed to the order of the Supreme Court of Florida denying petitioner's petition for a writ of certiorari.

Contrary to petitioner's assertion that his petition for a writ of certiorari "was timely filed in the Florida Supreme Court", respondents state that said petition was not filed within the automatic stay provision of Rule 4.5.c.(6), Florida Appellate Rules, 1962 Revision, nor did petitioner obtain a stay order from the Florida Supreme Court as required by said rule, which states in pertinent part:

> "The petition for certiorari under this rule shall be filed in the Supreme Court within 60 days from the rendition of the order, decision or judgment of the district court of appeal. The petition shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for the issuance of the writ. Unless the district court shall otherwise direct for good cause shown after notice and hearing, a petition for certiorari filed in the Supreme Court within 15 days from the date of the disposition of a petition for rehearing shall automatically stay further proceedings in the district court and the trial court until the disposition of said petition by the Supreme Court; otherwise such petition for certiorari shall operate as a stay of such pro-

ceedings only upon the order of the Supreme Court or the Chief Justice after due notice to the adverse party."

By not coming within the automatic stay provision or by not obtaining a stay order, has the period of time limited for instituting certiorari proceedings in the Supreme Court of the United States been tolled?

If an order staying all proceedings has the effect of tolling the running of the period limited for taking an appeal, it is submitted that the failure to obtain such a stay does not toll the running of the period. In 4A C.J.S. Appeal and Error, Sec. 443, at p. 112, it is stated:

"... An order staying all proceedings in a cause tolls the running of the period limited for taking an appeal..."

Thus, in the instant case, by filing his petition for a writ of certiorari in the Supreme Court of The United States on the ninetieth day after denial of his Supreme Court of Florida petition for a writ of certiorari and after failing to come within the automatic stay provisions of Rule 4.5.c.(6), supra, as to Supreme Court of Florida certiorari proceedings, it is submitted that the instant petition has not been timely filed.

ARGUMENT IN OPPOSITION TO REVIEW ON WRIT OF CERTIORARI

The District Court explained why the "generalized attack upon the ordinance as a whole was properly

denied". The District Court said (Inman v. City of Miami, Fla. App. 1967, 197 So.2d 50, at p. 51):

> "It may be that the ordinance is inartfully drawn and that enforcement of one or more provisions may prove difficult or even impossible. Nevertheless, the question here presented is whether it is void as a whole. When a court construes the validity of an ordinance, it must construe it to be legal if it is possible to do so. It must also strive to construe it as to give reasonable effect to its provisions. City of Miami v. Kayfetz, Fla. 1957, 92 So.2d 798. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State v. City of Miami, 101 Fla. 585, 134 So. 541. (1931)."

In a California case, Flores v. Los Angeles Turf Club, Inc., Cal. 1961, 361 P.2d 921, in which case two of the California cases cited by the petitioner are discussed, (Vallerga v. Department of Alcoholic Beverage Com., Cal. 1960, 347 P.2d 909; Stoumen v. Reilly, Cal. 1951, 234 P.2d 969), this general principle is stated, at p. 925, as follows:

> "In examining the rationality of the classification made by the pertinent provision of section 19561.5, the general principle must be considered that '[w]hen the classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts is presumed..."

At p. 923 of Flores, the Supreme Court of California stated:

> "...The Stoumen and Tarbox courts reasoned that the statutes involved, in mentioning only resort to the licensed premises for immoral purposes, or reputation for such conduct, failed to set a sufficiently definite standard for license revocation and did not base revocation on the licensees' failure to exclude a class of persons reasonably related to the legislative objective—that is, **persons presently conducting themselves improperly ON THE PREMISES.** The Vallerga court ordered the revocation set aside because it had been based on testimony as to patronage by homosexuals, **rather than the evidence as to improper acts committed on the premises.** This construction of Business and Professions Code, § 24200 was deemed necessary to save its constitutionality. The inference which may be drawn from the decisions in the Vallerga, Stoumen, and Tarbox cases is that in regulating the affairs of its licensees (or its citizens generally), **the state may not impose upon them the responsibility of governing conditions beyond their control,** and may not, by the application of general statutory standards, require them to undertake actions not specifically related to the objective which the state desires to accomplish. Accordingly, the regulated parties in these cases could not validly be divested of their licenses because of the somewhat unrelated past conduct of their customers..." (emphasis supplied)

Now, in examining the language of the Miami Code section in issue, what, if any, state of facts can reasonably be conceived that would sustain it?

The code section states that those in charge of an alcoholic beverage dispensing establishment cannot **knowingly** employ or sell to homosexuals, or, **knowingly** allow two or more homosexuals to congregate in such establishment. A homosexual person is a homosexual person as this term is commonly accepted and understood.

If a bartender observes a male customer kissing another male customer and fondling the other male customer's penis, should the bartender be held to the knowledge that these men are homosexuals within the meaning of the code section and that he cannot sell to them or allow them to congregate in his establishment?

In the Proposed Official Draft of The American Law Institute Model Penal Code (May 4, 1962) under Section 2.02 entitled "General Requirements of Culpability", the term "knowingly" is treated, as follows:

> "(b) **Knowingly.**
> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his

conduct, he is aware that it is practically certain that his conduct will cause such a result."

When the term homosexual person is "restricted in its application to those who presently perform acts of" homosexuality and the term "knowingly" is construed to mean awareness of homosexual conduct, isn't the factual statement, above, a reasonable conception of a state of facts that would sustain the validity of this code section?

Petitioner states in his brief (p. 5) that the District Court has ruled that "Because specific acts are made criminal in the State of Florida ... the State, by virtue of its police power, may inhibit the gathering of homosexuals where liquor is sold and prohibit the sale or service to them for on-premises consumption because the criminal acts, prohibited by Florida Statutes, Sec. 800.01 and 800.02, **when practiced** are of a homosexual nature." (emphasis supplied). Petitioner states that "what the State is doing is penalizing a status or condition when no criminal act is being committed."

This is petitioner's conclusion, however, and not that of the District Court or the respondents. In the enforcement of any provision of this code section, respondents would be guided, as indicated above, by the holdings in such cases as Nickola v. Munro, Cal. App. 1958, 328 P.2d 271, where, at p. 274, the court said:

"... We think that, before a licensee can be disciplined under this section, the licensee must have actual knowledge that his premises are being used for such purposes, or must know facts that

to a reasonable person would indicate that such was the fact. The usual and normal way that the tavern operator would or should know such fact is by the patrons engaging in such conduct on the premises that a reasonable man would know that the premises are being used as a 'resort for * * * sexual perverts.' We do not think that section 24200(c) was passed by the Legislature to repeal or to change the rule of the Stoumen case to the effect that improper or illegal or immoral conduct must occur on the premises before discipline of the licensee is permitted, but was passed with the Stoumen case in mind to clarify the rule of that case. This was the precise holding of this court in Kershaw v. Department of Alcoholic Beverage Control, 155 Cal. App.2d 544, 318 P.2d 494, decided in 1957. There the licensee was charged with allowing the licensed premises to be used in violation of the disorderly house statute involved in the Stoumen case, and as a 'resort for * * * sexual perverts' in violation of section 24200(e) of the Business and Professions Code. The evidence showed the commission of improper and immoral acts of the same general type as are here involved. This court stated (155 Cal. App.2d at page 548, 318 P.2d at page 496): 'There is evidence that such conduct was readily observable by the licensee and her agents, that much of it was observed by them, and that they took no measures to prevent or curb it. The evidence also supports an inference that these were not mere isolated, occasional, unexpected, unpre-

ventable and uncontrollable incidents.'" (emphasis supplied)

The very fact that petitioner has to read into the decision of the District Court a conclusion that is not only non-existent in the decision itself, but one that the District Court was not called upon to reach due to the shallowness of petitioner's case, if any, and the petitioner's questionable standing to sue; pin points, it is very respectfully submitted, the lack of a justiciable constitutional question, or, lack of a case or controversy within the appellate jurisdiction of the Supreme Court of the United States.

In the **Robinson v. State of California** case, 1962, 370 U.S. 660, 82 S. Ct. 1417, 8 L.ed.2d 758 cited by petitioner, Robinson **was convicted in the Municipal Court of Los Angeles** of violation of a statute making it a criminal offense for a person to be addicted to the use of narcotics.

In the **Boutilier v. Immigration Service** case, 1967, __ U.S. __, 87 S. Ct. __, 18 L.ed.2d. 661, cited by petitioner, Boutilier **was ordered deported** on the ground that he was, at the time of entry, an alien "afflicted with a psychopathic personality."

Here, not only is there no municipal court proceeding against the petitioner or against any owner, manager, or operator or employee of a business licensed to sell intoxicating beverages due to anything relating to the petitioner, but, as indicated above, no such proceeding is conceivable based simply on petitioner's WAIVERING ASSERTION that he is a homosexual person.

Petitioner can patronize any alcoholic beverage establishment in the City of Miami and he can remain there and congregate with others lawfully there, but the moment his conduct is such as described in the **Nickola** case, supra, he is inviting difficulty and if the circumstances are such that the management knows or should know of such conduct, a case for prosecution under the instant code section presents itself.

In the case of **Doremus v. Board of Education**, 1952, 342 U.S. 429, 72 S. Ct. 394, 96 L.ed. 475 a suit was brought against a board of education for a judgment declaring invalid a New Jersey statute providing for the reading of five verses of the Old Testament at the opening of each public school day. The United States Supreme Court held that no case or controversy within the appellate jurisdiction of the Supreme Court was presented. The Court said, starting at p. 430:

> "This action for a declaratory judgment on a question of federal constitutional law was prosecuted in the state courts of New Jersey. It sought to declare invalid a statute of that State which provides for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. N.J. Rev. Stat., 1937, 18:14-77, N.J.S.A. No issue was raised under the State Constitution, but the Act was claimed to violate the clause of the First Amendment to the Federal Constitution prohibiting establishment of religion.
>
> No trial was held and we have no findings of fact, but the trial court denied relief on the

merits on the basis of the pleadings and a pretrial conference, of which the record contains meager notes. **The Supreme Court of New Jersey, on appeal, rendered its opinion that the Act does not violate the Federal Constitution, in spite of jurisdictional doubts . . .**"

And, starting at p. 432:

"**The view of the facts taken by the court below, though it is entitled to respect, does not bind us and we may make an independent examination of the record . . .**"

* * *

"**. . . There is no assertion that she was injured or even offended thereby or that she was compelled to accept, approve or confess agreements with any dogma or creed or even to listen when the Scriptures were read. On the contrary, there was a pretrial stipulation that any student, at his own or his parents' request, could be excused during Bible reading and that in this case no such excuse was asked. However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was taken to this Court. Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest . . .**"

And, at p. 433:

> "The State raised the defense that appellants showed no standing to maintain the action but, on pretrial conference, perhaps with premonitions of success, waived it and acquiesced in a determination of the federal constitutional question. **Whether such facts amount to a justiciable case or controversy is decisive of OUR jurisdiction."**

And, at p. 434:

> **"We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such."** (emphasis supplied)

In the case of **Poe v. Ullman**, 1961, 367 U.S. 497, 81 S. Ct. 1752, 6 L.ed.2d 989 an action was brought for a declaratory judgment declaring invalid the Connecticut Statutes prohibiting the use of contraceptives. The United States Supreme Court held that the record disclosed no justiciable constitutional question for the reason that there was no showing that these statutes would be enforced against the plaintiffs.

In Poe, the Court said, at p. 498:

"These appeals challenge the constitutionality, under the Fourteenth Amendment, of Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse."

And, starting at p. 501:

"... During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in State v. Nelson, 126 Conn. 412, 11 A.2d 856. The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. There, a test case was brought to determine the constitutionality of the Act as applied against two doctors and a nurse who had allegedly disseminated contraceptive information. After the Supreme Court of Errors sustained the legislation on appeal from a demurrer to the information, the State moved to dismiss the information. Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contra-

ceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed. The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy * * *"—or not carrying it out—"are often tougher and truer law than the dead words of the written text." Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254.

The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution, see Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246, is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions.

The policy reflected in numerous cases and over a long period was thus summarized in the

oft-quoted statement of Mr. Justice Brandeis: "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (concurring opinion). In part the rules summarized in the Ashwander opinion have derived from the historically defined, limited nature and function of courts and from the recognition that, **within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.** See Little v. Bowers, 134 U.S. 547, 558, 10 S.Ct. 620, 623, 33 L.Ed. 1016; People of State of California v. San Pablo & Tulare R. Co., 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747; United States v. Fruehauf, 365 U.S. 146, 157, 81 S.Ct. 547, 554, 5 L.Ed.2d 476. In part they derive from the fundamental federal and tripartite character of our National Government and from the role—restricted by its very responsibility—of the federal courts, and particularly this Court, within that structure. See the Note to Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436; Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488-489, 43 S.Ct. 597, 601, 67 L.Ed. 1078; Watson v. Buck, 313 U.S. 387, 400-403, 61 S.Ct. 962, 966-968, 85 L.Ed. 1416; Alabama State Federation of Labor,

etc. v. McAdory, 325 U.S. 450, 471, 65 S.Ct. 1384, 1394, 89 L.Ed. 1725.

These considerations press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." Parker v. County of Los Angeles, 338 U.S. 327, 333, 70 S.Ct. 161, 163, 94 L.Ed. 144. See also Liverpool, N. Y. & P. S. S. Co. v. Commissioners, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899. The various doctrines of "standing," "ripeness," and "mootness," which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own "varied application"—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. Stearns v. Wood, 236 U.S. 75, 35 S.Ct. 229, 59 L.Ed. 475; State of Texas v. Interstate Commerce Comm., 258 U.S. 158, 42 S.Ct. 261, 66 L.Ed. 531; United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89-90, 67 S.Ct. 556, 564-565, 91 L.Ed. 754. "This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a rem-

edy is not to be had here." State of Georgia v. Stanton, 6 Wall. 50, 75, 18 L.Ed. 721, approvingly quoting Mr. Justice Thompson, dissenting, in Cherokee Nation v. State of Georgia, 5 Pet. 1, 75, 8 L.Ed. 25; also quoted in State of New Jersey v. Sargent, 269 U.S. 328, 331, 46 S.Ct. 122, 70 L.Ed. 289. "The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement * * *." Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078." (emphasis supplied)

CONCLUSION

Accordingly, this petition for a writ of certiorari should be denied.

Very respectfully submitted,

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By S. R. Sterbenz
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing brief in opposition to the petition for a writ of certiorari and true copies of the respondents' certified transcript of record on appeal have been served this 13th day of December, 1967, by depositing same in the United States mail with sufficient postage pre-paid to Tobias Simon and Alfred I. Hopkins, Esqs., 1701 Meridian Avenue, Miami Beach, Florida, and Maurice Rosen and Judith A. Brechner, Esqs., 350 Lincoln Road, Miami Beach, Florida.

S. R. Sterbenz

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Assistant City Attorney

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 717

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

RESPONSE TO RESPONDENT'S PREFACE

The Petitioner provided a certified transcript of the entire record in the trial court, to which court the record had been returned by the District Court of Appeal, Third District, the Court whose judgment or decree is sought to be reviewed. The same was done inasmuch as a certified copy of the record in the Supreme Court of Florida had been provided, and the record in the District Court of Appeal, Third District, was not available because that Court had returned it to the lower court. Rule 21, Supreme Court of the United States Revised Rules, Adopted June

12, 1967, Effective October 2, 1967, does not require that a copy of the transcript be served upon the Respondent and in accordance with the said Rule no copy was furnished to the Respondents. The entire record of the cause is before the Supreme Court of the United States via the certified transcript of record, certified by the Clerk of the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida.

RESPONSE TO RESPONDENT'S QUESTION PRESENTED

Respondent's handling of the omission of the word "knowingly" where the same is grammatically incorporated in Petitioner's Question by the use of the word in the immediately preceding clause of the Question indicates the weakness of its argument. The entire thrust of Petitioner's Argument is made in terms of the ordinance providing for knowledge on the part of the liquor licensee, and there was no attempt on the part of Petitioner to argue otherwise.

The Petitioner stated in the Question Presented that he is an admitted homosexual, this being in the Record as reflected in the Complaint. The respondent raises the proposition that the Petitioner had denied in a voluntary television appearance that he is a homosexual. The respondent had cross-assigned as error the denial by the trial court of its Motion to Strike the Complaint under Rule 1.14, Florida Rules of Civil Procedure, 1965 Revision, because there was, it alleged, unrefuted evidence showing that Petitioner was not a homosexual, by virtue of the television appearance. The District Court of Appeal, Third District, refused to consider the exercise of the trial

court's discretion in this particular, and the pertinent paragraph of the decision is hereafter quoted:

> "The City by cross-assignment contends that the court should have granted its motion to strike the complaint under Rule 1.14 Florida Rules of Civil Procedure, 1965 Revision, because there was evidence showing that appellant was not a homosexual at the time the proceeding was instituted. In view of our conclusion upon the appeal, it is unnecessary to consider the exercise of the trial court's discretion in this particular."

It would appear inappropriate for the United States Supreme Court to determine a question of the abuse of discretion of the trial court in connection with a Florida procedural rule when the Florida Appellate Court refused to go into the merits of this position. The Complaint (which was never stricken) admitted the homosexuality of the Petitioner and Respondent's attempt to alter Petitioner's Question Presented in this regard is improper.

As to the Respondent's proposition that no stay order was obtained from the Florida Supreme Court, the Petitioner asserts that this is an absurd argument. There was nothing to be stayed. Consequently, the failure to file Petition for Writ of Certiorari in the Florida Supreme Court within fifteen days from the District Court of Appeal's decision is of no effect. The said fifteen day provision which the Respondent quotes on P. 7 of its brief is merely to indicate that if it is required that something be stayed, that certiorari should be sought within fifteen days rather than within sixty days which is allowed by the Florida Appellate Rules. The fifteen day provision,

however, does not cut down the jurisdictional time of sixty days within which to seek certiorari. The Petitioner timely sought certiorari in the Florida Supreme Court and the same was denied on the ground that the Supreme Court had no jurisdiction since there was no conflict between the **Inman** decision and any other decision of the Florida Supreme Court or another District Court of Appeal. The Petitioner then timely sought certiorari to the District Court of Appeal, Third District, in the United States Supreme Court within ninety days from the Florida Supreme Court's denial of certiorari. This procedure has been recognized as proper in **American Railway Express Company v. Levee** (1923) 263 U.S. 19, 68 L.Ed. 140, 44 S.Ct. 11, wherein the Court discussed the fact that in Louisiana the Constitution of that State provides that the jurisdiction of its Supreme Court is discretionary, but that the Petitioner had to invoke that jurisdiction in order to make certain that the case could go no further in that State. When the Louisiana Supreme Court declined jurisdiction, the Court of Appeal was shown to be the highest court in the state in which a decision could be had. There it was pointed out that the limit of time within which to seek certiorari in the United States Supreme Court was from the date when the Writ of Certiorari was refused in the State Supreme Court. Likewise, in the instant case the time limit is to be computed from the date when the Florida Supreme Court refused certiorari. The automatic stay provision that Respondent refers to is completely irrelevant to the proposition that Florida allows sixty days from the date of the intermediate appellate court order within which to seek certiorari in the Florida Supreme Court, with which provision Petitioner complied.

RESPONSE TO RESPONDENT'S ARGUMENT

The entire thrust of the Argument of Petitioner's brief is from the point of view of the knowing allowance of the gathering of two or more homosexuals in the liquor licensee's establishment and the knowing sale or knowing service to homosexuals. Petitioner's argument is that the ordinance, instead of denouncing conduct, denounces a condition which may be unaccompanied by objectionable conduct. The Petitioner would not quarrel with an ordinance which prohibits the liquor licensee from knowingly serving or knowingly permitting two or more people to gather in his establishment if those people commit the acts which Respondent describes in its question on Page 11 of its brief.

Respondent's argument assumes that the condition of homosexuality necessarily implies the commission in public of objectionable conduct such as one male's fondling of another's private parts. That Respondent makes this assumption is made clear by its reliance on **Nickola v. Munro**, Cal. App. 1958, 328 P.2d 271, wherein there was evidence of objectionable activity on the part of the patrons. On the basis of the evidence of the commission of immoral acts, readily observable by the licensee, the court there found against the licensee. The Miami ordinance here under attack, however, makes the status, without more, without overt conduct, the criteria for serving liquor to or permitting homosexuals to gather on the licensee's premises.

The Respondent argues its brief in terms of conduct as illustrated in the first paragraph of the brief on Page

15, but it is not conduct which the ordinance prohibits; rather it is a status or condition, irrespective of conduct.

The distinction between the status of homosexuality and objectionable conduct committed in public by persons who may be homosexuals was clearly enunciated in the November 6, 1967, decision of the New Jersey Supreme Court, rendered in **One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control,** and the companion cases of **Val's Bar, Inc. v. Division of Alcoholic Beverage Control,** and **Murphy's Tavern, Inc. v. Division of Alcoholic Beverage Control,** A.2d , which decision is not yet available in the advance sheet of the Atlantic 2d Reporter, and is therefore reproduced in the Appendix hereto. In that case, the Division of Alcoholic Beverage Control had disciplined the liquor licensee for permitting apparent homosexuals to congregate at the licensed premises. The Alcoholic Beverage Control suspended the license of two licensees and revoked the license of another. The New Jersey Supreme Court reversed, and after tracing the history of regulations in reference to liquor, said the following:

> "In the very cases before us the Division of Alcoholic Beverage Control made it clear that it has not in anywise moderated its long standing position that permitting the congregation of apparent homosexuals, without more, is violative of Rule 5. The evidence against Murphy's Tavern disclosed many individual acts which could have been the basis of specified and individualized charges of lewd or immoral conduct at the licensed premises. But no such charges were preferred and when, during the course of cross-

examination, one of the division's investigators was asked whether he had observed any lewdness at Murphy's Tavern, the prosecuting attorney pointed out that the division had not alleged 'any immoral activity or lewdness itself' but had simply alleged that the licensee had 'permitted the licensed place of business to become a nuisance' in that it had allowed 'these persons to come in and congregate upon the premises.'

"In the **One Eleven** proceeding there was no charge and no substantial evidence that lewd or immoral conduct was permitted at the licensed premises. There was a charge and sufficient evidence that the licensee had permitted apparent homosexuals to congregate there. Investigators had visited the premises on several occasions and had observed the patrons; the testimony included the following partial account of their behavior:

> They were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements to each other. One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They took short sips from their straws; took them quite a long time to finish their drink.

* * *

They were very, very endearing to one another, very very delicate to each other.

* * *

They looked in each other's eyes when they conversed. They spoke in low tones like an effeminate male. When walking, getting up from the stools, they very politely excused each other, hold on to the arm and swish and sway down to the other end of the bar and come back. * * *

Their actions and mannerisms and demeanor appeared to me to be males impersonating females, they appeared to be homosexuals commonly known as queers, fags, fruits and other names.

"Similarly in the proceeding against Val's Bar there was no charge nor any substantial evidence at the hearing before the director that lewd or immoral conduct was permitted at the licensed premises. Investigators had visited the premises on several occasions and testified in detail as to the behavioral characteristics which led them to the permissible conclusion that the patrons were apparent homosexuals."

The crucial holding of the New Jersey Supreme Court is:

"Though in our culture homosexuals are indeed unfortunates, their status does not make

them criminals or outlaws. **Cf. Robinson v. California**, 370 U.S. 660, 8 L.Ed.2d 758 (1962). So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like.

* * *

"... Now, in the 1960's, the transitional need as such is long past and it is entirely appropriate that full sweep be given to current understandings and concepts. Under them it seems clear that, so long as the division can deal effectively with the matter through lesser regulations which do not impair the rights of well behaved apparent homosexuals to patronize and meet in licensed premises, it should do so. Such narrower course would be consonant with the settled and just principle that restrictions adopted in the exercise of police powers must be reasonable and not go beyond the public need. **See N. J. Good Humor, Inc. v. Bradley Beach**, 124 N.J.L. 162, 168 (E. & A. 1940); **Reingold v. Harper**, 6 N.J. 182, 192 (1951); **cf. Griswold v. Connecticut, supra**, 381 U.S. at 485-86, 14 L.Ed.2d at 515-16; **NAACP v. Alabama**, 377 U.S. 288, 307, 12 L.Ed.2d 325, 338 (1964).

"It must be borne in mind that the division has produced nothing to support any need for continuance of its flat prohibition. Nor has it produced anything to indicate that it could not readily prepare and enforce a fair and sensible regulation which, while permitting apparent homosexuals to assemble in and patronize licensed establishments, prohibits overtly indecent conduct and public displays of sexual desires manifestly offensive to currently acceptable standards of propriety. Such a regulation might well be adopted forthwith to the end that future proceedings would rightly be based on specific charges of improper conduct at the licensed premises rather than, as here, upon general charges of mere congregation which we deem to be unreasonable and legally unsupportable. In the meantime, the discipline imposed in the three cases before us must be set aside, without prejudice, however, to any new charges which the division may prefer against the licensees, or any of them, clearly describing the individual acts alleged to be violative of the provisions in Rule 5 aimed at lewd and immoral conduct within the licensed premises. See Vallerga v. Dept. of Alcoholic Beverage Con., supra, 347 P.2d at 913-14."

The New Jersey Supreme Court clearly differentiates between the status of homosexuality and homosexual conduct which conduct could be prohibited by ordinance. It is this very differentiation which Petitioner is arguing.

CONCLUSION

For the reasons asserted in Petitioner's main brief and asserted herein, it is submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALFRED I. HOPKINS

JUDITH A. BRECHNER
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed this _____ day of January, 1968, by depositing a copy of the same in the United States mail with sufficient postage pre-paid to RICHARD E. GERSTEIN, State Attorney, Metropolitan Justice Building, Miami, Florida, and to ALAN R. ROTHSTEIN, City Attorney, S. R. STERBENZ, Asst. City Attorney, 65 S.W. 1st Street, Miami, Florida, Attorneys for Respondent CITY OF MIAMI.

ALFRED I. HOPKINS

APPENDIX

SUPREME COURT
OF NEW JERSEY

Nos. A-8, A-9 and A-10

September Term 1967

ONE ELEVEN WINES & LIQUORS, INC.,
a New Jersey corporation,
Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE
CONTROL and JOSEPH P. LORDI,
Director, etc.,
Respondents.

VAL'S BAR, INC., a New Jersey corporation,
Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE
CONTROL and JOSEPH P. LORDI,
Director, etc.,
Respondents.

MURPHY'S TAVERN, INC.,
Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE
CONTROL,
Respondent.

Argued September 11 and 12, 1967. Decided Nov. 6, 1967.

On certification by the Supreme Court.

Mr. Theodore Sager Meth argued for the appellant One Eleven Wines & Liquors, Inc. (**Messrs. Busch & Busch,** attorneys).

Mr. Norman A. Oshtry of the Pennsylvania Bar argued for the appellant Val's Bar, Inc. **Messrs. Jacobson & Silverman,** attorneys).

Mr. Louis R. Cerefice argued for the appellant Murphy's Tavern, Inc.

Mr. Stephen Skillman, Deputy Attorney General, argued for the respondents Division of Alcoholic Beverage Control and Joseph P. Lordi, Director, etc. (**Mr. Arthur J. Sills,** Attorney General of New Jersey, attorney; **Mr. Richard Newman** and **Mr. Michael Rudolph,** Deputy Attorneys General, on the brief).

Mr. Avrom J. Gold, attorney for F. & A. Corporation, and **Messrs. Diamond and Pitman,** attorneys for The Mattachine Society, Inc., filed briefs **amicus curiae.**

The opinion of the Court was delivered by JACOBS, J.

The Division of Alcoholic Beverage Control disciplined the appellants for permitting apparent homosexuals to congregate at their licensed premises. It suspended

the licenses of One Eleven Wines & Liquors, Inc. and Val's Bar, Inc. and revoked the license of Murphy's Tavern, Inc. On One Eleven's appeal to the Appellate Division the suspension of its license was sustained under the authority of **Paddock Bar, Inc. v. Alcoholic Beverage Control Div'n.**, 46 N.J. Super. 405 (App.Div. 1957) and **Murphy's Tavern, Inc. v. Davis**, 70 N.J. Super. 87 (App. Div. 1961), We granted certification on the licensee's application. 48 N.J. 349 (1966). We also certified, on our own motion, the appeals which had been duly taken to the Appellate Division by Val's Bar and Murphy's Tavern and were awaiting argument there. R.R. 1:10-1.

The disastrous experiences of national prohibition led to the adoption of the twenty-first amendment and to the return of liquor control to the states in 1933. **See Grand Union Co. v. Sills**, 43 N.J. 390, 399 (1964). When our Legislature during that year first created the Department of Alcoholic Beverage Control, it vested broad regulatory powers in a state commissioner who immediately set about to insure that abuses which had originally contributed so heavily in bringing about national prohibition, would not be permitted to recur. He adopted stringent regulations which he rigidly enforced and which the courts supported with great liberality. **See Franklin Stores Co. v. Burnett**, 120 N.J.L. 596 (Sup.Ct. 1938; **Gaine v. Burnett**, 122 N.J.L. 39 (Sup.Ct. 1939). He concerned himself not alone with matters of lawfulness but also with matters of public sensitivity for he firmly believed that the effectiveness of the new mode of control would turn on the extent of the public's acceptance of the manner in which licensed establishments were conducted. Here again the courts sustained his pertinent regulatory actions with broad sweep. **See McFadden's Lounge v. Div.**

of Alcoholic Beverage Control, 33 N.J. Super. 61 (App. Div. 1954; Paddock Bar, Inc. v. Alcoholic Beverage Control Div'n., supra, 46 N.J. Super. 405.

Among the commissioner's early regulations were Rules 4 and 5 which were adopted in 1934. Rule 4 provided that no licensee shall allow in the licensed premises "any known criminals, gangsters, racketeers, pickpockets, swindlers, confidence men, prostitutes, female impersonators, or other persons of ill repute." And Rule 5 provided that no licensee shall allow "any disturbances, brawls, or unnecessary noises" or allow the place of business to be conducted "in such manner as to become a nuisance." In 1936 Rule 5 was revised to include an express prohibition of "lewdness" and "immoral activities," and in 1950 it was again revised to include an express prohibition of "foul, filthy, indecent or obscene language or conduct." See McFadden's Lounge v. Div. of Alcoholic Bev. Control, supra, 33 N.J. Super. at 64; Jeanne's Enterprises, Inc. v. State of N.J., etc., 93 N.J. Super. 230 (App. Div.), aff'd, 48 N.J. 359 (1966).

During the years prior to 1954 the department instituted proceedings under Rule 4 on the basis of evidence that apparent homosexuals had been permitted to congregate at the licensed premises. Apparently the department considered that the effeminate manifestations of the patrons brought them within the prohibition of "female impersonators" although that term relates more properly to transvestites who are, for the most part said to be non-homosexuals. In Re M. Potter, Inc., A.B.C. Bulletin 474, Item 1 (August 7, 1941) the investigators had observed a group of male patrons, "whose voices, gestures and actions were effeminate," dancing and kissing among

themselves. Although there was an express finding that "no actual acts of immorality" were committed at the licensed premises, the license was nonetheless suspended. In the course of his formal opinion, the acting commissioner said that the mere "presence of female impersonators in and upon licensed premises presents a definite social problem"; and in line with the then widespread intolerance and limited public understanding of the subject, he made references to "the deep-rooted personal contempt felt by a normal red-blooded man" and to the notion that "the mere thought of such perverts is repugnant to the normal person."

Since 1954 and despite increasing public tolerance and understanding, departmental proceedings aimed at the congregation of apparent homosexuals have continued apace but have been brought under Rule 5 rather than Rule 4. They have not been based on any specific and individualized charges of lewd or immoral conduct but rather on general charges that by permitting the apparent homosexuals to congregate, the licensees had allowed their places of business to be conducted in such a manner "as to become a nuisance" within the contemplation of Rule 5. In **Re Polka Club, Inc.**, A.B.C., Bulletin 1045, Item 6 (December 27, 1954) the then director, in suspending a license on a charge of violation of Rule 5, said that he would not permit licensed premises to become "havens for deviates." In **Re Kaczka and Trobiano**, A.B.C. Bulletin 1063, Item 1 (April 21, 1955) the licensee introduced expert testimony that homosexuality is not contagious and that seeing groups of homosexuals would not affect normal people but the license was nonetheless suspended. As illustrated in many of his rulings, including **Re Louise G. Mack**, A.B.C. Bulletin 1088, Item 2 (November 2, 1955),

the director entertained the view that since exposure to homosexuals might be harmful to some members of the public" the congregating of homosexuals must be prohibited as a "threat to the safety and morals of the public." See Paddock Bar, Inc. v. Alcoholic Beverage Control Div'n., supra, 46 N.J. Super. at 408.

In the very cases before us the Division of Alcoholic Beverage Control made it clear that it has not in anywise moderated its long standing position that permitting the congregation of apparent homosexuals, without more, is violative of Rule 5. The evidence against Murphy's Tavern disclosed many individual acts which could have been the basis of specified and individualized charges of lewd or immoral conduct at the licensed premises. But no such charges were preferred and when, during the course of cross-examination, one of the division's investigators was asked whether he had observed any lewdness at Murphy's Tavern, the prosecuting attorney pointed out that the division had not alleged "any immoral activity or lewdness itself" but had simply alleged that the licensee had "permitted the licensed place of business to become a nuisance" in that it had allowed "these persons to come in and congregate upon the premises."

In the One Eleven proceeding there was no charge and no substantial evidence that lewd or immoral conduct was permitted at the licensed premises. There was a charge and sufficient evidence that the licensee had permitted apparent homosexuals to congregate there. Investigators had visited the premises on several occasions and had observed the patrons; the testimony included the following partial account of their behavior:

They were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements to each other. One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They took short sips from their straws; took them quite a long time to finish their drink. * * *

They were very, very endearing to one another, very very delicate to each other. * * *

They looked in each other's eyes when they conversed. They spoke in low tones like an effeminate male. When walking, getting up from the stools, they very politely excused each other, hold on to the arm and swish and sway down to the other end of the bar and come back. * * *

Their actions and mannerisms and demeanor appeared to me to be males impersonating females, they appeared to be homosexuals commonly known as queers, fags, fruits and other names.

Similarly in the proceeding against Val's Bar there was no charge nor any substantial evidence at the hearing before the director that lewd or immoral conduct was permitted at the licensed premises. Investigators had visited the premises on several occasions and testified in detail as to the behavioral characteristics which led

them to the permissible conclusion that the patrons were apparent homosexuals. See 7 Wigmore, Evidence § 1974 (3d ed. 1940); Tyree The Opinion Rule, 10 Rutgers L.Rev. 601 (1956); cf. State v. Campisi, 23 N.J. 513, 520 (1957); State v. Guerrido, 60 N.J. Super. 505, 511 (App.Div. 1960). The investigators acknowledged that for the most part the patrons were "normally dressed" and showed "very good behavior." Dr. Wardell B. Pomeroy, called as an expert witness by the licensee, testified that, although it could not be said from mere observation that any given individual was a homosexual, he would be of the opinion that tavern patrons with the characteristics described by the investigators were apparent homosexuals.

Dr. Pomeroy was associated with the Kinsey Institute for twenty years and was the co-author of several books dealing with sexual behavior and offenses. He referred to the Kinsey studies which were contained startling indications that 13% of the males in the country were "more homosexual than heterosexual" and that 37% had "at least one homosexual experience to the point of orgasm in the course of their life." He also referred to indications that 55% of the population was neutral on the subject of homosexuality and there is now "a more acceptance attitude" than there was twenty years ago. See Mosk, Foreward to The Consenting Adult Homosexuals and the Law, 13 U.C.L.A. L.Rev. 644, 645 (1966). In response to an inquiry by the division's hearer, Dr. Pomeroy voiced the opinion that no adverse effects would result from permitting homosexuals to congregate in licensed establishments. He noted that non-homosexuals would not be harmed by being in the same premises with homosexuals, and that any who found their mere presence to be offensive would presumably leave. He ex-

pressed the view that permitting their congregation in taverns would tend to eliminate clandestine associations in unregulated and unsupervised places of public nature. See Cory and LeRoy, The Homosexual and His Society 119, 121 (1963); see also Schur, Crimes Without Victims 86, 87 ((1965) where Dr. Schur dealt with the so-called "gay" bars operating in our neighboring states and elsewhere:

> Although such establishments are sometimes condemned as breeding grounds of homosexuality, the charge is not convincing. Most of the people who go there (apart from tourists and some "straight" friends) already are involved in the homosexual life. Anyone who wanders in and who is offended by what he sees is perfectly free to leave. The authors of a recent "view from within" emphasize that although an increase in homosexuality may increase the demand for homosexual bars, the bars can scarcely be said to produce homosexuals. Indeed, as these writers go on to suggest, the bars serve to keep homosexuals "in their place"—out of more public places and, to a certain extent, beyond the public view.*

* The authors referred to by Dr. Schur are Cory and LeRoy who at pages 121-22 of their book entitled *The Homosexual and His Society* had this to say:

> It can be argued that gay bars spread homosexuality and the elimination of them will help arrest this development. However, people who argue this way usually have little or no understanding of the problem and know very little about such bars. Most of those who go to gay bars are already homosexual and those who are not have no interest in remaining in these places for long, and seldom return. It is difficult to imagine a person walking into a gay bar and becoming homosexual, if he had not already been favorably disposed to such activity.

The views expressed by Doctors Pomeroy and Schur find significant legal support in various judicial holdings, notably those of the California Supreme Court. In **Stoumen v. Reilly**, 37 Cal. 2d 713, 234 P.2d 969 (1951) the license was suspended because the licensee had permitted "persons of known homosexual tendencies" to patronize and meet at the licensed premises. Under Section 58 of the California Alcoholic Beverage Control Act, it was unlawful to permit the licensed premises to be conducted as a disorderly house or as a place "to which people resort for purposes which are injurious to the public morals, health, convenience or safety." The court, in setting aside the suspension, held that mere patronage "without proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes" was not sufficient to show a violation of Section 58. Elsewhere in its opinion it stressed that in order to establish "good cause" for suspension of the license, something more must be shown than that many of the patrons were homosexuals and used the premises "as a meeting place." 234 P.2d at 971.

After the **Stoumen** case was decided, the California Legislature enacted the provision in section 24,200, subdivision (e) of the Business and Professions Code under which licensed premises were prohibited from being used as resorts for "sexual perverts." In **Vallerga v. Dept. of Alcoholic Beverage Con.**, 53 Cal. 2d 313, 1 Cal.Rptr. 494, 347 P.2d 909 (1959) a license was revoked because the licensee had permitted his premises to become a resort for homosexuals. The revocation was set aside by the California Supreme Court which held that the legislative provisions was unconstitutional under **Stoumen**. The court also considered the contention that, apart from the pro-

vision declared unconstitutional, the revocation could be sustained on the ground that continuance of the license would be "contrary to public welfare and morals" within the lower court holdings in **Nickola v. Munro**, 162 Cal. App.2d 449, 328 P.2d 271 (1958) and **Kershaw v. Department of Alcoholic Beverage Control**, 155 Cal.App.2d 544, 318, P.2d 494 (1957); in this connection it said:

> In the Nickola case the court held generally that seeking sexual gratification in a public tavern with another of the same sex would offend the moral sense of the general public. The court stated, 162 Cal. App.2d at page 457, 328 P.2d at page 276: "There are many things that can be done in the privacy of the home which may not be illegal, but if done in a public tavern are directly offensive to public morals and decency, and demonstrate that the participants are sex perverts. The continuance of the license under such circumstances 'would be contrary to public welfare or morals' as provided in our Constitution. * * * Further than that we do not have to go." Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances (see Kershaw v. Department Alcoholic Bev. Control, supra, 155 Cal.App.2d 544, 547-548, 318 P.2d 494), may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. But any public display which manifests sexual desires, whether they be

heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society. 347 P.2d at 912.

The court in **Vallerga** was of the opinion that the record before it contained sufficient evidence of overtly offensive acts within the licensed premises upon which specific and individualized charges of conduct "contrary to public welfare or morals" could have been preferred against the licensee. But no such charges had been preferred and the only charge preferred, namely, permitting the premises to become a resort for homosexuals in violation of subdivision (e), was the one held by the court to be constitutionally infirm. The court's setting aside of the revocation was presumably without prejudice to the right to proceed against the licensee on specific and individualized charges and proof of overt acts within the licensed premises offensive to "good morals and decency." **See** 347 P.2d at 913-14; **cf. Sabes v. City of Minneapolis,** 265 Minn. 166, 120 N.W.2d 871, 878 (1963).

While the New York cases contain obscurities, many of them seem to take an approach comparable to that taken by the California Supreme Court. Thus in **People v. Arenella,** 139 N.Y.S.2d 186 (N.Y.C. Mag.Ct. 1954) the court, in dealing with a criminal charge that a licensee had allowed his premises to become disorderly, differentiated cases deemed disorderly where the premises were frequented by homosexuals in "open and notorious manner, for the purpose of soliciting others to commit lewd and indecent acts" from others, not deemed disorderly, where the evidence established nothing more than that homosexuals patronized the premises without engaging in prohibited acts therein. 139 N.Y.S.2d at 189.

Similarly in **Kerma Restaurant Corporation v. State Liquor Authority**, 27 A.D.2d 918, 278 N.Y.S.2d 951 (1966) the court, while sustaining the revocation of a license on the basis of solicitation and other overtly offensive acts within the licensed premises, acknowledged that the "mere congregation of homosexuals, where there is no breach of the peace, does not make the premises disorderly" within the meaning of New York's Alcoholic Beverage Control Law. 278 N.Y.S.2d at 952. **See In re Farley**, 217 N.Y. 105, 111 N.E. 479, 481 (1916); **cf. Lynch's Builders Restaurant, Inc. v. O'Connell**, 303 N.Y. 408, 103 N.E.2d 531 (1952); **Fulton Bar & Grill, Inc. v. State Liquor Authority**, 11 A.D.2d 771, 205 N.Y.S.2d 37 (1960); **Gilmer v. Hostetter**, 20 A.D.2d 586, 245 N.Y.S.2d 252 (1963).

In **Re Revocation of License of Clock Bar, Inc.**, 85 **Dauphin County Reports** 125 (Pa. 1966) the court sustained a suspension grounded on evidence of improper solicitations by homosexuals at the licensed premises. However, in the course of its opinion it pointed out there was "no law which forbids homosexuals from being patrons of licensed premises," that the mere, though open, congregation of homosexuals at the licensed premises would not sustain a charge that the licensee maintained "a disorderly house," and that homosexuals at licensed premises become objectionable only "when they make a nuisance of themselves" by improper solicitation or other overtly offensive conduct. 85 **Dauphin County Reports** at 131. **See Cesaroni v. Smith**, 202 A.2d 292 (R.I. 1964); **but cf. Inman v. City of Miami**, 197 So.2d 50 (Fla.Dist.Ct.App. 1967), **petition for cert. filed**, 36 U.S.L.W. 3163 (U.S. Oct. 11, 1967) (No. 717).

Though in our culture homosexuals are indeed unfortunates, their status does not make them criminals or outlaws. Cf. **Robinson v. California**, 370 U.S. 660, 8 L.Ed.2d 758 (1962). So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like. See **Stoumen v. Reilly, supra**, 234 P.2d at 971. In sustaining the suspension of One Eleven's license, the Appellate Division took the position that it was not concerned with the rights of the patrons since technically the legal issue before it was the validity of Rule 5 under which the license was suspended. But the asserted rights of the homosexuals to assemble in and patronize licensed establishments are intertwined with the asserted rights of licensed establishments to serve them. Surely in these circumstances, the licensees are properly to be viewed as having standing to seek vindication of the various rights involved in order that the Court's ultimate determination may soundly rest on the complete mosaic. Cf. **Griswold v. Connecticut**, 381 U.S. 479, 481, 14 L.Ed.2d 510, 512 (1965); **NAACP v. Alabama**, 357 U.S. 449, 458, 2 L.Ed.2d 1488, 1497 (1958); **Barrows v. Jackson**, 346 U.S. 249, 255, 97 L.Ed. 1586, 1594 (1953); **Pierce v. Society of Sisters**, 268 U.S. 510, 535, 69 L.Ed. 1070, 1078 (1925); Sedler, **Standing to Assert Constitutional Jus Tertii in the Supreme Court**, 71 Yale L.J. 599, 626 (1962).

The Division of Alcoholic Beverage Control, stressing the acknowledged constitutional and statutory breadth of its regulatory powers (**Boller Beverages, Inc. v. Davis**, 38

N.J. 138, 150 (1962); **Guill v. Mayor and Council of City of Hoboken**, 21 N.J. 574 (1956)), contends that the mere congregation of apparent homosexuals in taverns is contrary to the public welfare and may therefore reasonably be prohibited under its wide police powers. Cf. **Jeanne's Enterprises, Inc. v. State of N.J., etc., supra**, 93 N.J. Super. at 232. It points to the fact that the very term "apparent homosexuals" contemplates effeminate behavioral characteristics, such as those described earlier in this opinion, but apparently it concedes, as it must in the light of the times, that such behavioral characteristics without more, would not constitute overt conduct offensive to current standards of morality and decency. It expresses various fears which we have carefully considered but which lack significant support in the records before us or in the available materials on the subject.

Thus the division suggests that the presence of apparent homosexuals in so-called "gay" bars may serve to harm the occasional non-homosexual patrons who happen to stray there but it produces nothing to rebut the expert testimony or the published writings to the contrary. See **Cory and LeRoy, supra** at 121; **Schur, supra** at 87. It further suggests that offensive conduct by apparent homosexuals within the licensed premises "may lead to violence" against them by non-homosexuals but this ignores the licensee's comprehensive capacity and responsibility, at the peril of its license, for precluding offensive conduct and for conducting its establishment in lawful and orderly fashion. See **In re Olympic, Inc.**, 49 N.J. Super. 299, 305-09 (App. Div.), **certif. denied**, 27 N.J. 279 (1958). Finally, it points out that it has consistently tried "to increase public respect and confidence in the liquor industry" (cf. **X-L Liquors v. Taylor**, 17 N.J. 444, 451 (1955)) and suggests

that permitting the congregation of apparent homosexuals, even though carefully supervised, will impair such public respect and confidence. But here again it furnishes nothing affirmative in support of its position which appears to disregard the burgeoning movement towards greater tolerance and deeper understanding of the subject. See Mosk, **supra**, 13 U.C.L.A. L.Rev. at 645; **Model Penal Code** § 207.5, Comment (Tent. Draft No. 4, 1955).

When in the 1930's the Department of Alcoholic Beverage Control first took its severe position, it acted on the assumption that the mere congregation of apparent homosexuals had to be outlawed to achieve effective control. It of course had no experience to support the assumption but it took the prohibitory course as the safer one for the then fledgling system. At the time, the interests of the patron in question were given little consideration and were in any event overwhelmed by the then highly felt transitional need for sweeping restraint. Now, in the 1960's the transitional need as such is long past and it is entirely appropriate that full sweep be given to current understandings and concepts. Under them it seems clear that, so long as the division can deal effectively with the matter through lesser regulations which do not impair the rights of well behaved apparent homosexuals to patronize and meet in licensed premises, it should do so. Such narrower course would be consonant with the settled and just principle that restrictions adopted in the exercise of police powers must be reasonable and not go beyond the public need. See **N. J. Good Humor, Inc. v. Bradley Beach**, 124 N.J.L. 162, 168 (E. & A. 1940); **Reingold v. Harper**, 6 N.J. 182, 192 (1951); cf. **Griswold v. Connecticut, supra**, 381 U.S. at 485-86, 14 L.Ed.2d at 515-16;

NAACP v. Alabama, 377 U.S. 288, 307, 12 L.Ed.2d 325, 338 (1964).

It must be borne in mind that the division has produced nothing to support any need for continuance of its flat prohibition. Nor has it produced anything to indicate that it could not readily prepare and enforce a fair and sensible regulation which, while permitting apparent homosexuals to assemble in and patronize licensed establishments, prohibts overtly indecent conduct and public displays of sexual desires manifestly offensive to currently acceptable standards of propriety. Such a regulation might well be adopted forthwith to the end that future proceedings would rightly be based on specific charges of improper conduct at the licensed premises rather than, as here, upon general charges of mere congregation which we deem to be unreasonable and legally unsupportable. In the meantime, the discipline imposed in the three cases before us must be set aside, without prejudice, however, to any new charges which the division may prefer against the licensees, or any of them, clearly describing the individual acts alleged to be violative of the provisions in Rule 5 aimed at lewd and immoral conduct within the licensed premises. See **Vallerga v. Dept. of Alcoholic Beverage Con., supra, 347 P.2d at 913-14.**

Reversed.

SUPREME COURT OF NEW JERSEY
Nos. A-8, A-9 and A-10 — September Term 1967

ONE ELEVEN WINES & LIQUORS, INC.,
a New Jersey corporation,
Appellant,

v.

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and JOSEPH P. LORDI, Director, etc.,
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VAL'S BAR, INC., a New Jersey corporation,
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Appellant,

v.

DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
Respondent.

PROCTOR, J. (concurring)

Since the charges against the three taverns did not specify any particular offensive acts by the patrons, I concur with the majority opinion. However, I wish to emphasize that, although well-behaved homosexuals cannot be forbidden to patronize taverns, they may not engage in any conduct which would be offensive to public decency. In the record before us it appears that there was evidence of conduct (men kissing each other on the

lips, etc.) which would form the basis for disciplinary action at least against One Eleven and Murphy's had they properly been charged. A tavern should not provide an arena for the behavior disclosed by this record. I appreciate that the majority opinion does not say that such conduct will be tolerated, but nonetheless I am expressing my positive view that it should not be.